92-1520

CASE NO. _____

In the Supreme Court

of the United States

October Term, 1992

DENNIS BROSS et al.

Petitioners,

v.

EARL SMITH et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OHIO

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QUESTION PRESENTED FOR REVIEW

Where written documents both defame plaintiffs and make threats against plaintiffs' safety, is such speech constitutionally protected and may plaintiffs recover for both defamation and for intentional infliction of serious emotional distress?

LIST OF ALL PARTIES TO THE PROCEEDING

1. Steven Schmidt, Plaintiff
2. Dennis Bross, Plaintiff
3. Theodore Marsh, Plaintiff
4. Donald Wells, Defendant
5. Earl Smith, Defendant
6. The City of Middletown, Ohio, Defendant

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STATEMENT OF JURISDICTION

The Ohio Supreme Court declined to hear this matter on October 21, 1992 and refused a rehearing on December 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

This case involves an interpretation of the First Amendment to the United States Constitution in a defamation action.

STATEMENT OF THE CASE (containing facts)

This case arose by the plaintiffs, Dennis Bross, Theodore Marsh, and Steven Schmidt filing a Complaint against Earl Smith, Chief of the Middletown Police Department, Donald Wells, Deputy Chief of the Middletown Police Department, and The City of Middletown.

The Complaint alleged causes of action for intentional infliction of emotional distress and defamation.

The case was tried to a jury after Motions for Summary Judgment were overruled.

At the end of the plaintiffs' case, the defamation claims of all the plaintiffs were dismissed by the Court. Also at the end of the plaintiffs' case, the intentional infliction claims of plaintiffs Bross and Schmidt were dismissed against all defendants, and the intentional infliction claims of Theodore Marsh were dismissed against defendants Earl Smith and The City of Middletown.

The case proceeded on the cause of action for intentional infliction of severe emotional distress by Theodore Marsh against Donald Wells. A jury returned a verdict in favor of Theodore Marsh in the amount of $100,000.00 compensatory damages and $500,000.00 punitive damages.

Motions for a new trial by all parties were overruled.

Plaintiffs Marsh, Bross and Schmidt filed motions for a new trial.

Because the Court of Appeals ruled the plaintiffs had no right of action on a constitutional basis, it did not consider any of the other errors alleged by the plaintiffs or defendants on appeal to the Court of Appeals.

At the trial court level, the issue of constitutionally protected speech was raised with the trial court holding that the writings were insufficient for defamation, and that plaintiffs Schmidt and Bross had presented insufficient evidence on the cause of action on intentional infliction of serious emotional distress.

However, the Court also dismissed the case as to Earl Smith and The City of Middletown brought by all plaintiffs. Plaintiff Marsh proceeded on a cause of intentional infliction of serious emotional distress against defendant Wells.

The First Amendment issues of constitutionally protected speech were raised again on appeal by the defendants in order to

preserve the trial court's judgment and to overturn the jury's verdict in favor of plaintiff Marsh. Plaintiffs also appealed the granting of a directed verdict on their defamation claims and their intentional infliction claims.

Statement of Facts

On June 15, 1987, the Middletown, Ohio Chief of Police, Russell Dwyer, was suspended by City Manager William Burns as a result of allegations of wrong doing brought to the attention of the City Manager by five police supervisors, including two of the plaintiffs, Steven Schmidt and Ted Marsh, both of whom were sergeants in the Middletown Police Department. Five days after Dwyer's suspension, defendant Donald Wells went on injury leave and returned in November of 1987.

In the meantime, Ronald Van Arsdale, who had been appointed Acting Chief, was replaced by Defendant Earl Smith as Chief of Police. Earl

Smith became Chief of Police on November 4, 1987.

Beginning shortly after the suspension of Russell Dwyer, a series of documents were issued, Plaintiffs' Trial Exhibits 1 through 11, known as the "rat letters". The contents were, to say the least, uncomplimentary to the plaintiffs and included threats to their job, threats to their family, and unfounded accusations. Plaintiffs filed a lawsuit based upon these letters as well as other activities conducted by the defendants. Copies of these "rat letters" are attached to this memorandum.

The case went to trial and the following evidence was elicited.

Donald Wells who is a Deputy Chief of the Middletown Police Department was good friends with Russell Dwyer. In fact, he and his wife went to Donald Wells' cabin in Cumberland on a number of occasions, and both their wives were good friends. He testified there developed in

the department a split known as the "A Team" and the "B Team", which was Dwyer vs. Burns.

Wells felt that the five supervisors, including the plaintiffs Marsh and Schmidt, were part of a conspiracy to remove Russell Dwyer. Included in this conspiracy were the former City Manager, William Burns, City Commissioner, Guy Stone, two former City Commissioners, Gary Shoupe and Pat Shaffer, as well as possibly Commissioner Gary Kaup. He described the conspiracy as one to remove Russell Dwyer with half-truths and was designed to gain power. He felt the conspiracy was ongoing, led by Bill Becker, another sergeant, and Marsh. He testified that he felt that Ted Marsh was running the Middletown Police Department in his absence. He discussed the conspiracy with many people including Chief of Police, Earl Smith, and his friend, former Chief of Police, Russell Dwyer.

Don Wells and his wife held a 50th birthday party for Russell Dwyer in January 1988. A

number of friends were invited to the party at which time "A Team" shirts were passed around. According to the witness for the plaintiffs, Sandy Caudill, more than just "A Team" shirts were passed out.

Sandy Caudill was formerly married to Gary Watson, a sergeant on the police force, and identified with the "A Team". She had been a police officer since January 1987. In January 1988 she and her ex-husband went to the birthday party for Russell Dwyer. When they arrived, only Janet and Don Wells were there. Don Wells handed a letter to Gary Watson, which he said that he and Russell Dwyer had composed. This letter would be edited, retyped and posted on the bulletin board in the police department.

The letter circulated by Don Wells to her husband, Gary, was very similar to the exhibits identified as "rat letters". It accused the plaintiffs of various misdeeds and said that they would get what was coming to them for betraying Russ Dwyer.

Don Wells also testified that the "rat letters" were all put in the mail boxes and posted on the bulletin board in the police station, in the squad room which was not available to the public but which was available to all police personnel. He admitted that he did not like or trust anyone on the "B Team", and that included particularly Ted Marsh who he described in his testimony as a previous friend of his but after the Dwyer incident he did not like him.

Don Wells also testified that when he came back to work his goal was to investigate all the members of the "B Team", including the plaintiffs, to build a case against them and that he was still investigating to get them charged with conspiracy because he felt that they committed a felony. Even though he admitted there was no evidence, he was still convinced that the conspiracy existed. He went so far as to tell the Chief of Police, Earl Smith, that the ultimate goal of his

investigation was to charge plaintiffs with conspiracy. Chief Smith told him to proceed.

Major Wells' dislike of the "rats" went so far as to include a display in his office consisting of a Middletown Police cruiser entering Fridley, Minnesota, where Bill Burns is now the City Manager. It also included Officer Ershel Philpot standing next to a likeness of Mickey Mouse with a pile of cheese and a pamphlet on rat control, displayed on his office wall. He also kept two rubber stamps for use of denying "B Team" members' requests. One rubber stamp read "Wrong Team Eugene", and the other one read "Not in Your Lifetime Jesse". Major Wells was not sure where the phrase "Not in Your Lifetime Jesse" came from.

The "rat letters" spoke of a felony conspiracy, and that all the plaintiffs and others should be indicted for a conspiracy, proclaimed Russ Dwyer's innocence, and displayed many of the same sentiments displayed by Major Wells in his testimony. Earl Smith, the Chief

of Police, also believed in the conspiracy, admitted that he and Don Wells discussed the conspiracy, and that the conspiracy was very real, and that he had given Don Wells the okay to investigate.

Even though Earl Smith had received a number of complaints about Donald Wells, including a complaint from Guy Stone, a City Commissioner, reporting to him that a study by an independent agency, which was done at the request of the City, identified Major Wells as a continuing source of division in the police department, he took no action. Chief Smith claimed that he brought back Major Wells to restore discipline and to restore the chain of command.

Major Wells was a firm believer in the chain of command. He believed that one of the worst things that could happen was violation of the chain of command, since a violation of the chain of command caused terrible things to happen, like what happened to Russ Dwyer. As a

matter of fact, Don Wells testified that Chief Smith felt the chain of command was not being followed, and he wanted Major Wells to rectify it. Major Wells felt the way to rectify it was to take care of Ted Marsh, who he viewed as a major violator of the chain of command.

Ernie Howard, a major in the police department, also discussed the conspiracy with Major Wells. He testified that Major Wells wanted to fire the five supervisors involved in the conspiracy.

A number of other witnesses testified, including Don Owens. Don Owens was one of the five supervisors who went to the City Manager. Don Owens testified about his concerns and why the five had gone to the City Manager in the first place. Don Owens expected no personal gain but felt that after he had talked to both Major Howard and at that time Major Smith, now Chief Smith, about the problems in the police department and the possibility that Russell Dwyer was involved in some serious misconduct

and received no response from them, that it was time that the City Manager learned about the situation.

Owens also expressed concern about Major Wells' activities after the Dwyer resignation to both Earl Smith and to Major Howard. Major Howard agreed that Wells was a problem and even went so far as to go to Chief Smith about the problem, but nothing happened.

Mike Bruck, another one of the five supervisors, testified as to the changes he noted from Ted Marsh and Steve Schmidt as a result of the letters coming out and the allegations. He noted an increase in the level of frustration and their level of anger. These changes were noted by others, including Bill Becker, another one of the five supervisors, Jerry Chapman, a detective in the City of Middletown, and Wendell Sorrell, a patrolman who worked for Sergeant Marsh. Both Mike Bruck and Bill Becker also complained about Major Wells. Bill Becker went so far as to talk to the Chief

of Police about Major Wells' activities, which did no good.

John McGill, who was a patrolman and president of the Fraternal Order of Police, testified that Major Wells came out at night to follow both Sergeant Marsh and Sergeant Schmidt while they were on duty, and these two were the only sergeants Major Wells ever followed.

James Hall, a patrolman who had been involved in an incident where he had a meeting with Major Wells, was accused by Major Wells of perjuring himself on behalf of the "B Team", the same accusation against James Hall that came out in a "rat letter".

The plaintiffs all testified as to the effects the letters had on them and to other harassment they received. All the plaintiffs testified that they felt angry, distressed, nervous and depressed.

For example, Denny Bross testified that he was depressed and nervous, that the letters caused him a great deal of stress, particularly

since they not only referred to him as a doper, but they threatened his job. They also referred to his girlfriend as a "cunt".

Steven Schmidt, another plaintiff, testified that he felt jeopardized in his job because of Major Wells, and this caused him much stress and nervousness. He explained this by saying that out on a street as a police sergeant he was called upon to make tough decisions and felt that because of the animosity openly expressed by Major Wells that he was being second-guessed, and that Major Wells would use any opportunity to get back at him. He felt that the letters threatened him and his position and greatly upset him. He further noted that he and Sergeant Marsh both were accused by Major Wells of stealing ammunition.

Sergeant Schmidt was able to establish the origin of the "A Team" and "B Team" denominations. The "A Team" were those who were pro-Dwyer, and the "B Team" being those who were perceived as having helped in the removal of

Dwyer. Sergeant Schmidt identified a document which noted that the "A Team" was a pro-Dwyer team and pro-truth team, that the "B Team" was a team of lies and innuendos, and that there were now two windows at the credit union; the one on the left for the "B Team", and the one on the right being the "A Team", and that the "B Team" window could be further recognized by the large rubber rat on top of the counter.

Sergeant Marsh detailed his career and the stress caused to him by this incident. He was accused numerous times by Major Wells of making accusations to the City Manager, and accused of having serious problems with the chain in command, to-wit: the Dwyer issue.

Earl Smith also accused Sergeant Marsh of trying to remove him from office, the same as he did Russell Dwyer. Sergeant Marsh replied to Earl Smith that after what he had gone through, he would have no more part of any investigations

even if the Chief of Police had been Charles Manson.

Sergeant Marsh was treated by June Nelson, a licensed social worker, who decided that Sergeant Marsh needed time off for the stress that was being caused him. The City then ordered Sergeant Marsh to see Dr. Roger Fisher. Sergeant Marsh did not want to go because he felt that the evaluation from Dr. Fisher would be used by the police department as more harassment. However, he did go to Dr. Fisher. Dr. Fisher described in detail the stress both the letters and other activities have caused to Sergeant Marsh. He described the letters as mental torture and the product of a paranoid mind and a very sick person. In cross-examination, Dr. Fisher noted that he saw two different personalities in the letters.

The defendants presented evidence which included Janet Wells, who is Don Wells' wife, who testified and confirmed indeed that she was a friend of Russ Dwyer, but claimed that the

letter that Sandy Watson Caudill saw was a letter to the editor. The letter was typed, she admitted, by her good friend Pat Dwyer, who is Russell Dwyer's wife. When confronted with the actual "rat letters", she admitted that they were shocking and outrageous and constituted serious misconduct. She also admitted that her husband thought the plaintiffs were in a conspiracy to remove Russ Dwyer and should be fired.

Gary Watson, a sergeant in the Middletown Police Department, testified for the defendants stating again that what he saw at the birthday party was merely a letter to the editor. He testified that his wife, Sandy, read five "rat letters" when she came home on the weekends from the police academy, which he identified as Exhibits 2, 6, 7 and 9, but could not recall the other one. He noted that his wife was in the police academy for four months in 1987.

However, as was shown by other evidence, three of the four letters which Gary Watson said

his wife saw while in the academy were not written until 1988, long after she got out of the police academy.

Gary Watson admitted that he relayed to Robin Collier, a woman identified on the "rat letters", and one who had believed to have given information against Russell Dwyer, a message from Russell Dwyer that he was coming back and was going to get everyone involved in the investigation.

Steven Daley, a Middletown patrolman, noted that whoever wrote the letters had serious emotional problems and could be dangerous.

In fact, Officer Daley had requested an investigation to be done on the letters. His letter requesting the investigation was Exhibit "8", which identified the date which Exhibit "9" was posted. He also felt that everyone who had been mentioned in the letters was outraged and upset. He noted that Ted Marsh was extremely upset by the letters and had commented on them at roll call.

Earl Smith testified for the defendants. He introduced a report which was a preliminary investigation from Lieutenant Emmett Terry, who was assigned to investigate the authorship of the "rat letter".

Two of the lieutenants' suggestions were that members of the department be given a polygraph, and that the letters be presented to a police psychologist to do a profile for possible psychological testing of members of the department to give clues as to who may be involved. Chief Smith did not feel that this was necessary because it would be too expensive, even though Lieutenant Don Owens had told him that Major Wells was causing the disruption in the department. Chief Smith did characterize the letters as outrageous.

Don Wells testified in his own behalf, denying writing the letters. He likewise characterized them as being very vile and abusive. He reiterated that when the chain of command is violated, terrible things can happen.

For instance, what happened to Russ Dwyer. In the same testimony he noted that that is exactly why he mentioned the Dwyer affair on two occasions to Ted Marsh to show Sergeant Marsh that he violated the chain of command again just like he did with the Dwyer episode.

The jury returned a verdict in favor of Ted Marsh in the amount of $100,000.00 compensatory damages and $500,000.00 punitive damages.

REASONS FOR ALLOWING WRIT

Plaintiffs believe this Court should allow the Writ of Certiorari to review this matter. Attached hereto to this petition are what is known as the "rat letters". These were the exhibits, along with the other evidence recited in the Statement of Facts, that are the basis of the claim.

The Court of Appeals for the Twelfth District in this case ruled upon no other question except whether or not the "rat letters" could be found to be defamatory. The court upheld the jury's finding that Donald Wells participated in the authorization of these letters. The court further held that the letters were outrageous, and a product of a sick, paranoid mind. However, the court held that the letters fell within a realm of protected speech and could not subject the author to liability for defamation or intentional infliction of emotional distress.

The court in reaching its decision compared a number of cases from this Court and from other federal courts. The court compared Milkovich vs. Lorain Journal Co., (1990) 497 U.S. ____, 110 S.Ct. 2695, with Hustler Magazine vs. Falwell, (1988), 485 U.S. 46, 108 S.Ct. 876. In Hustler, this Court held that if the speech was protected one could not recover for the tort of intentional infliction of emotional distress even if the speech produced such emotional distress.

The plaintiffs submit that the case at hand is greatly different from any of the cases relied upon by the Court of Appeals. The letters are more than just hyperbole or even defamation. They accuse plaintiffs and others of assertions that are provable as true or false. For example, the plaintiffs are accused of illegally using narcotics, of falsely accusing the Chief of Police of improprieties, of stealing ammunition, of committing felonies, doing burglaries, having sex with each other's

wives and girlfriends, and various other immoral and illegal activities.

In Hustler the claim for intentional infliction of emotional distress arose out of the embarrassment of Reverend Jerry Falwell by Hustler Magazine. There was no indication that the parody involved was designed to do any more than embarrass or humiliate.

However, the "rat letters" also contain threats. To take the Twelfth District Court of Appeals' decision to its ultimate, a death threat written to a person would be non-actionable even if it inflicted serious emotional harm on a person, solely because telling someone you intended to kill them is not defamatory. What is clear from the transcript is that both Major Wells and Chief Earl Smith used their position to threaten and inflict emotional distress upon the plaintiffs.

The trial court gave the following instruction without objection:

> Again, the extreme and outrageous character of the conduct may arise

> from an abuse by the actor of a position or relation with the other which gives him actual or apparent authority over the other or power to effect his interest.

A review of the "rat letters" shows that their clear intent was to more than defame, but to threaten. The first page lists the official MPD "rat" list. It closes with "Any motherfucker who rats on a cop is no cop." It further advises its listeners that given half a chance these same people will get them. The second page speaks of the "rats" in defamatory language. It advises the then City Manager, Bill Burns, to resign, and that if he doesn't, "he gets fucked." It also notes that everybody else mentioned in the "rat letters" will get the same treatment.

The third letter has a date of July 7 and gives the City Manager one week. In that week he is to resign and "tell all your fuckin' dope-headed, back-biting, hypocritical rats that you can't cover their asses any more and that they had better consider getting the fuck out." If

he doesn't, action will be taken against all the "rats" to embarrass and humiliate them.

Likewise, what was marked as Exhibit 5, a two-page letter, refers again to the "rats", and says "it's time for the truth to emerge". The rest of the letters are of the same nature, not only defamatory remarks but threats against their employment and their persons.

The evidence clearly showed, as found by both the jury and by the Court of Appeals, that Major Wells was behind these letters. In fact, Sandy Caudill's testimony of the birthday party is particularly telling. He, along with ex-Chief of Police Dwyer, had composed a "rat letter" to hang on the bulletin board. The discussion was that the "rats" were going to pay for their betrayal of Dwyer. Attending this party was the current Chief of Police, Earl Smith, as well as Major Don Wells, and others. Clearly, a jury could find that even if these letters were not strictly defamatory, they were

intended to threaten plaintiffs and to inflict severe emotional distress upon them.

It is clear that the First Amendment does not protect all speech. In the case of Braun vs. Soldier of Fortune Magazine, Inc., (1992) 968 F.2d 1110, the United States Court of Appeals for the Eleventh Circuit had occasion to consider a case in which the sons of a murder victim brought a wrongful death action against a magazine accusing the defendants negligently published an advertisement that created an unreasonable risk of solicitation of violent criminal activity. The case was based upon the placing of an ad in Soldier of Fortune Magazine, which read in part as follows:

> "Gun for hire: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Bodyguard, courier and other special skills. All jobs considered ..."

The individual who placed this ad was later hired through the ad to murder the father of the plaintiffs.

The Eleventh District Court of Appeals held that such an ad was actionable as against the magazine if it created an unreasonable risk of solicitation of violent criminal activity since such solicitation was not covered by First Amendment protections. The Court of Appeals recognized that even though commercial speech was protected, advertisements to engage in illegal activities were not so protected.

Plaintiffs believe that this case is applicable to the case at hand for the reason that as with advertisements soliciting criminal activity, threats are not constitutionally protected.

Over and above the letters themselves, there was other evidence of the intention of Major Wells and other persons to inflict emotional distress. Major Wells had made it clear that he did not like or trust anyone on the "B Team", particularly Ted Marsh. His goal was to investigate members of what was known as the "B Team", including plaintiffs, to build a

case against them and to get them charged with conspiracy because they had committed a felony.

Major Wells had a display in his office consisting of a Middletown Police cruiser entering Fridley, Minnesota where former City Manager Bill Burns is now the city manager. It included a picture of Officer Ershel Philpot standing next to a likeness of Mickey Mouse and a pile of cheese. He further displayed a pamphlet on rat control and kept two rubber stamps for use of denying "B Team" members' requests. One stamp read "Wrong Team Eugene," and the other read "Not In Your Lifetime Jesse." The evidence was clear that Chief of Police Earl Smith also believed in the conspiracy theory, and that he and Don Wells often discussed the conspiracy, feeling it was very real, and Earl Smith gave Don Wells the okay to investigate the conspirators.

Ernest Howard, another police major who discussed the conspiracy with Major Wells, testified that Wells wanted to fire the five

supervisors involved in the conspiracy. Major Wells would come out at night to follow Sergeant Marsh and Sergeant Schmidt while they were on duty even though they were the only sergeants Major Wells every followed.

Thus, it is clear that the entire pattern was intended to intentionally inflict emotional distress on the plaintiffs by threatening them with their livelihood and their reputations, and were clearly meant to defame them.

It is clear that plaintiffs felt that the letters and activities of those in command, including and specifically Major Wells who was head of the division in which all three plaintiffs worked, constituted more than just name calling. Sergeant Schmidt, Sergeant Marsh and Officer Bross all testified that they were concerned for their career and their safety because of the threats that had been made. It is clear from Major Wells' testimony, that he did in fact intend to fire them. Dr. Roger Fisher, who treated Sergeant Marsh, and to whom

the City had initially referred Sergeant Marsh for an evaluation for continued employment, likened the activities, including the "rat letters" to mental torture and testified at length that Sergeant Marsh felt threatened in his job and in his family because of the threats.

Plaintiffs believe that this Court should grant the writ to certify as this case involves a significant constitutional issue, and further believe that the Court of Appeals erred in finding that these letters could not give rise to a cause of action for defamation and for intentional infliction of emotional distress. The letters contained clear defamation, implying that the plaintiffs and others are thieves, burglars, drug addicts, and child molesters. Clearly, such accusations go far beyond the cartoon caricature in Hustler and provide both defamation and more importantly, taken in the context in which this entire case is heard, a

threat to the safety and welfare of the plaintiffs.

Therefore, plaintiffs submit that this Court should grant the Writ.

CONCLUSION

Plaintiffs believe that this case has significance, not only within the constitutional realm, but also a significance that effects a very fundamental right, and that is the right of a police officer to report misconduct by superiors without fear that they will be subjected to ridicule and threats by other superiors. If police officers are not free to report such wrong-doing to the proper authorities, then in effect law enforcement will be seriously hampered. The authors of the "rat letters" understood this principle. The threats were more than implied. They were very clear that, "Anyone who rats on a cop is no cop."

Respectfully submitted,

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APPENDIX

Filed in the Court of Appeals
Butler County, Ohio

June 1, 1992

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY, OHIO

DENNIS BROSS, et al.	*	Case No. CA90-11-217 CA91-04-067
Plaintiffs-Appellees/ Cross-Appellants,	*	
vs.	*	MEMORANDUM DECISION AND JUDGMENT ENTRY
EARL SMITH, et al.	*	6/1/92
Defendants/ Cross-Appellees,	*	
DONALD WELLS	*	
Defendant-Appellant Cross-Appellee.	*	

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Per Curiam. This cause came on to be considered upon a notice of appeal, the transcript of the docket and journal entries, the transcript of proceedings and original papers from the Butler County Court of Common Pleas, and upon the briefs and oral arguments of counsel. Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App. R. 12(A) as follows:

On July 19, 1989, plaintiffs-appellees/cross-appellants, Dennis Bross, Theodore Marsh and Steven Schmidt, filed a complaint against defendant-appellees, Earl Smith and the city of Middletown. In their complaint, Bross, Marsh and Schmidt sought damages for defamation and intentional infliction of emotional distress.

A jury trial commenced on July 11, 1990. The evidence presented at trial revealed that

Bross, Marsh and Schmidt are all police officers for the city of Middletown. Smith is the current chief of police, and Wells is the assistant chief of police who holds the rank of major.

In June 1987, the former Middletown Chief of Police, Russell Dwyer, was suspended by former Middletown City Manager William Burns as a result of allegations of misconduct brought by five police supervisors, including Marsh and Schmidt. Shortly after Dwyer's suspension, Wells went on injury leave and did not return until November 1987. Ronald Van Arsdale became acting chief of police after Dwyer's suspension. Smith became police chief on November 4, 1987. Smith asked Wells to return to duty to head the patrol section because he felt Wells could establish discipline that was lacking in that section of the department. Wells became Marsh's supervisor.

As a result of Dwyer's suspension, a severe division developed in the police department.

Those who supported Dwyer, including Wells, became known as the "A team." Those who were associated with the individuals who had accused Dwyer became known as the "B team." Schmidt and Marsh, because of their involvement with bringing the allegations against Dwyer, were part of the B team.

Shortly after Dwyer's suspension, a series of vulgar and profane letters began appearing on the department bulletin board and in the mail boxes of the police officers. The first letter provided a list of "rats" including Marsh and Schmidt. Bross was also listed as one of the rats, although he was not involved in the Dwyer investigation. Evidence revealed that Bross had several confrontations with Wells. This first letter stated that "[a]ny mother fucker that rats on a cop is no cop." These "rat letters" as they came to be known, talked about Dwyer's innocence and accused the "rats" of plotting to get Dwyer. A series of letters called various individuals and the "rats" collectively vulgar

and profane names, made various allegations of wrongdoing, and threatened firing and criminal prosecution of individuals associated with the "B team."

Wells and his wife, Janet, were good friends with Dwyer and his wife, Pat. Wells felt that Schmidt and Marsh and others involved in the Dwyer investigation were part of the conspiracy led by former city manager Burns to "set up" Dwyer and obtain power for themselves. Wells felt the conspiracy was on-going. Wells stated that when he came back to work following his injury leave, his goal was to investigate and have prosecuted all those involved in the conspiracy because he felt they committed a felony. Smith testified that he felt the police officers involved in the Dwyer investigation were misled by Burns and that the conspiracy had ended when Burns was discharged by the city. Smith allowed Wells to investigate his conspiracy suspicions and told him to take no action until the results of his investigation

were reviewed by the city law department. Wells stated that he did not uncover enough evidence to secure an indictment against the alleged conspirators.

Several officers testified that Wells displayed several inflammatory items in his office. These items consisted of a photograph of a Middletown police cruiser entering Findley, Minnesota where Burns became city manager after leaving Middletown; a photograph of Officer Ershal Philpot, who was associated with the "B team" standing next to the likeness of Mickey Mouse with a pile of cheese; and a pamphlet on rat control. Wells also used two phrases which were later memorialized on rubber stamps which some officers claimed were used to deny various requests of "B team" members. One phrase was "wrong team Eugene" and the other was "not in your lifetime Jessie." Wells claimed that the phrase "wrong team Eugene" referred to the swat team and that the other phrase was one he had just heard somewhere.

Some individuals in the police department felt Wells was a decisive element and expressed this view to Smith. One member of the "B team" told Smith that the "A team/B team" division would not end unless Smith transferred Wells out of his supervisory position over the patrol department. Guy Stone, a Middletown city commissioner, testified that the author of a report designed to help unify the police department told him that Wells was "a problem." Smith apparently did consider transferring Wells and testified that he was committed to ending the division in the police department.

Wells adamantly denied writing the "rat" letters and witnesses testifying in his behalf indicated that at least in professional situations he did not use the profane language used in the rat letters.

In June 1988, Wells and his wife held a fiftieth birthday party for Dwyer at their home. Some individuals who attended the party wore "A team" shirts. Sandy Caudill, who was formerly

married to police officer Greg Watson, attended the party. Watson was identified with the "A team." Caudill testified that she and her ex-husband sat in the kitchen with Janet and Don Wells. Wells handed a letter to Watson which he said that he and Dwyer had composed. The letter talked about Marsh, Schmidt and Bross and some others identified with the "B team." Caudill read the letter over her ex-husband's shoulder and stated that it contained "quite a bit of vulgarity." The letter called various individuals "dopers" and other names later to be seen in the rat letters. Caudill testified that the letter stated how "Dwyer had taking [sic] care of them *** that they all had stabbed him in the back *** and they would pay for what they had done to him." Wells and Watson discussed the unsigned letter and Wells stated that he would have his wife retype it. Witnesses for Wells testified that the letter was a letter to the editor written by Janet Wells which she asked Watson to review. Caudill stated that the

letter she saw definitely was not a letter to the editor. However, Caudill never actually saw any of the rat letters herself, although her ex-husband had read her the contents of some. Caudill stated she could not identify any of the rat letters as being the letter she saw.

At the close of plaintiffs' case, the trial court admitted the rat letters into evidence over defendants' objections. The trial court granted a directed verdict in favor of Smith and the City of Middletown on all claims by all three plaintiffs. The court also granted a directed verdict to Wells on all claims by Bross and Schmidt and on Marsh's claim for defamation. As to Bross' and Schmidt's claims for intentional infliction of emotional distress, the court specifically concluded that they failed to present sufficient evidence that they suffered severe emotional distress. The court denied Wells' motion for directed verdict as to Marsh's claim for intentional infliction of

emotional distress and allowed the issue to go to the jury.

The jury returned a verdict in favor of Marsh, awarding him compensatory damages of $100,000 and punitive damages of $500,000. Bross, Schmidt and Marsh filed motions for a new trial, which were overruled by the trial court. Wells filed a motion for a new trial, for a remittitur and for relief from judgment. The court originally granted Wells' motion for remittitur, concluding that the award of damages was the result of passion and prejudice and was against the manifest weight of the evidence. The court granted a remittitur of $50,000 on the compensatory damages and $475,000 on the punitive damage or, in the alternative, a new trial. After the parties sought a clarification of the court's order, the court ordered a new trial solely on the issue of damages. Wells filed a timely appeal and appellees Bross, Schmidt and Marsh filed a cross-appeal.

Wells presents seven assignments of error for review; appellees present three assignment of error for review. All assignments of error are set out in their entirety in Appendix A attached to this decision. However, we shall address the assignments of error in a sequence that is different from that which appears in Appendix A.

In his second assignment of error, Wells states that the trial court erred in "admitting documents alleged to have been written by the defendant Wells as they were not properly authenticated." Wells argues that the alleged rat letters should not have been admitted into evidence because insufficient evidence was presented showing that Wells authored the documents. We find this assignment of error is not well-taken.

Evid R. 901(A) provides:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to

> support a finding that the matter in question is what its proponent claims.

One manner of authenticating a document is to have a witness with knowledge testify that the document is what is proponent claims it to be. Evid. R. 901(B)(1).

Wells argues that since appellees did not present sufficient evidence that he wrote each of the nine rat letters, they were not adequately authenticated. Wells claims that "the major dispute in this case is whether Wells actually wrote" the letters. Certainly, in a broad sense, appellees were attempting to prove that the rat letters were documents authored by Wells; indeed, the authorship of the letters was an ultimate issue of fact for the jury to decide. However, on a more basic level, appellees claim the documents they presented into evidence were the actual "rat letters," i.e., they were the letters at issue, the letters that defamed them and caused them emotional distress.

1 Ohio Evidence, Weissenberger Section 901.14 discusses the authentication requirement:

> A writing may be authenticated under Evid. R. 901(B)(1) by testimony of a witness who has first hand knowledge of the execution, preparation or custody of the writing. For example, where connective relevancy involves attributing authorship or execution to a particular individual, a person who was present at the signing of the document may testify that the document offered at trial is the same one he saw executed by a particular individual. Additionally, a witness may authenticate a writing based upon his familiarity with the writing, acquired by having read, typed, or prepared it, or by having supervised its preparation or having had custody of the document. *** Any firsthand knowledge of a writing, however acquired, is an appropriate basis for testimony on the issue of authentication where the testimony logically connects the documents with the issues of the case.

In the present case, no one seriously disputed that the letters appellees introduced

into evidence were the "rat letters." Several witnesses testified that the exhibits were the letters they had seen on the bulletin board in the department or had received in their mailboxes. Marsh, Schmidt and Bross identified the letters as the letters that were distributed which caused them distress. "Authentication procedure is a form of relevancy; that is, authentication connects the particular evidence sought to be introduced to the issues or persons involved in the trial." Staff note to Evid. R. 901(A). Evid. R. 901 seeks to screen out "evidence which cannot meet a minimal threshold test of connective relevancy." Weissenberger, supra, at section 901.2. We believe there was sufficient evidence to connect the letters to the issues involved in the trial and to show that the exhibits were what appellees claimed they were. See State v. Kehn (1977), 50 Ohio St. 2d 11, 15-16, certiorari denied (1977), 434 U.S. 858, 98 S.Ct. 180.

If we were to accept Wells' argument that proof of authorship is required before a document could be admitted into evidence, then a document whose authorship is questioned or disputed could never be admitted into evidence for any reason. We do not believe the Rules of Evidence require this result. Wells is really arguing that there was insufficient evidence from which the jury could conclude that Wells wrote the letters, which is an entirely different question than whether the letters were properly authenticated. Accordingly, Wells' second assignment of error is overruled.

In their first and third assignments of error, appellees argue that the trial court should not have granted a directed verdict on all defamation claims and on Bross' and Schmidt's emotional distress claims. In his third and fourth assignments of error, Wells argues that his motion for directed verdict for judgment N.O.V. as to Marsh's claim for intentional infliction of emotional distress

should have been granted. Wells argues that Marsh failed to present sufficient evidence of actual malice as required by Hustler Magazine v. Fallwell (1988), 485 U.S. 46, 108 S.Ct. 876. Because resolution of these assignments of error involve the same issues of law, we will consider them together. We find that Wells' assignments of error are well-taken and are dispositive of the appeal.

In New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S.Ct. 710, the U.S. Supreme Court held that a public official may not recover damages for defamation unless the official proves that the defamatory statement was made with actual malice. Id. at 280-281, 84 S.Ct. at 726. Actual malice in defamation cases may be demonstrated by evidence that the defendant published the statement at issue "with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 281, 84 S.Ct. at 726; Varanese v. Gall (1988), 487 U.S. 1206, 108 S.Ct. 2849. Police

officers acting within the scope of their official capacity are public officials and therefore enjoy only limited protection from public discussion and criticism. Mueller v. Stover Communications, Inc. (1988), 46 Ohio App. 3d 57, 58.

Two recent U.S. Supreme Court decisions affect the outcome of the present case. Hustler, supra, relied upon by Wells, arose out of an ad parody published in Hustler Magazine which portrayed Rev. Jerry Fallwell as having engaged in a drunken, incestuous rendezvous with his mother in an outhouse. Fallwell filed suit against the magazine and its publisher, Larry Flynt, for, among other things, libel and intentional infliction of emotional distress. In the trial court, a jury returned a verdict in favor of Hustler on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual fact ***." Hustler, supra, at 49, 108 S.Ct. at 878. However, the jury found in

Fallwell's favor on the emotional distress claim and awarded him compensatory and punitive damages. The court of appeals affirmed the verdict in Fallwell's favor. The U.S. Supreme Court reversed, holding that public figures and public officials may not recover for the tort of intentional infliction of emotional distress without showing that the publication contained a false statement of fact made with actual malice. Id. at 56, 108 S.Ct. at 882. The court declined to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when the speech could not have reasonably been interpreted as stating actual facts about the public figure involved. Id. at 50, 108 S.Ct. at 879.

In Milkovich v. Lorain Journal Co. (1990), _____ U.S. _____, 110 S.Ct. 2695, the Supreme Court rejected a distinction made by many lower courts between fact and opinion. It declined to create "a wholesale defamation exemption for

anything that might be labeled 'opinion.'" Id. at ____, 110 S.Ct. at 2705. Instead, the court concluded that the dispositive question was whether the alleged defamatory statement is sufficiently factual to be susceptible of being proved true or false. Id. at ____, 110 S.Ct. at 2707.

Nevertheless, the Milkovich decision also reiterates that statements which cannot reasonably be interpreted as stating actual facts about an individual are equally protected. Id., citing Hustler, supra, at 50, 108 S.Ct. at 879. "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." Milkovich, supra, at ____, 110 S.Ct. at 2706.

In Milkovich, a newspaper published a column which implied that Milkovich, a high school wrestling coach, lied under oath in a judicial proceeding. The Supreme Court

concluded that the connotation that Milkovich committed perjury is sufficiently factual to be susceptible of being proved true or false. It stated: "[t]his is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression." Milkovich, supra, at ____, 110 S.Ct. at 2707.

In the present case, the trial judge granted a directed verdict in favor of all defendants on all defamation claims, but allowed Marsh's emotional distress claim to go to the jury. However, we conclude that the only plausible basis to grant a directed verdict on the defamation claims is insufficient proof of actual malice, i.e., that the statements were made with knowledge that they were false or with reckless disregard of whether they were true or false. Under the supreme court's holding in Hustler, for a public official to

prevail on a claim of intentional infliction of emotional distress, the official must also prove actual malice. We therefore conclude that in this case the defamation and emotional distress claims must stand or fall together. If a directed verdict was proper as to the defamation claims, it was proper as to the emotional distress claims. Similarly, if the defamation claims should have gone to the jury, then the emotional distress claims should also have gone to the jury provided the other elements of the tort were sufficiently proven.

We find the application of the principles set forth in Hustler, supra, and Milkovich, supra, to the present case to be problematic. The writings in this case seem to fall in a gray area between the writings in Hustler and in Milkovich. The rat letters contain assertions that are arguably provable as true or false. For example, was Bross a "doper" or "pill head," i.e., did he use illegal drugs; did Marsh and Schmidt "fuck" the chief, i.e., did they falsely

accuse the chief to obtain power for themselves; did Dwyer "cover" for them; did Marsh and Schmidt steal ammunition; were the rats "fucking each other's wives and girlfriends," i.e., engaging in the same types of sexual misconduct of which they accused Dwyer? Nevertheless, it is certainly arguable that the letters use the "sort of loose, figurative or hyperbolic language which would negate the impression" that these individuals committed these acts. Further, the "general tenor" of the letters could negate any impression that the "rats" committed any improprieties. Accordingly, we have examined some lower court cases interpreting Hustler and Milkovich.

In Phantom Touring, Inc. v. Affiliated Publications (C.A.1, 1992), 953 F. 2d 724, a touring company that produced a musical-comedy version of the Phantom of the Opera sued a Boston newspaper. In a series of articles, the newspaper questioned whether the touring company's advertisements made the distinction

between the touring company's production of Phantom and the hugely successful Andrew Lloyd Weber play. The author of the articles stated that the touring company's production had been "thriving off the confusion created by the two productions." The article quoted a drama critic for the Washington Post who said that its version "bears as much resemblance to its celebrated counterpart as Jell-o does to baked Alaska" and who further described the show as "a rip-off, a fraud, a scandal, a snake oil job." Several articles suggested not only that the touring company was benefiting from the mistaken identity, but that the confusion was intentional.

The First Circuit Court of Appeals concluded that the quoted language describing the production as "a rip-off, a fraud, a scandal, a snake-oil job" was figurative and hyperbolic, and there was no objective evidence which could disprove it. It also said whether the touring company's Phantom is "fake" or

"phony" is also unprovable since those adjectives admit numerous interpretations. Id. at 728. The court concluded that the claim of defamation was colorable in only one respect. Two of the articles written by the theatre critic for the newspaper contained language insinuating that the Phantom touring company was marketing its production dishonestly and that it was deliberately confusing the public. The court stated that "[a]rguably, the connotation of deliberate deception is sufficiently factual to be proved true or false, and therefore is vulnerable under Milkovich." Id. at 729. However, the court went on to state that "we think the context of each article rendered the language not reasonably interpreted [sic] as stating 'actual facts' about appellant's honesty. The sum effect of the format, tone and entire content of the articles is to make it unmistakably clear that [the critic] was expressing a point of view only. As such, the challenged language is immune from liability."

Id. See, also, Don King Productions, Inc. v. Douglas (S.D.N.Y. 1990), 742 F. Supp. 778.

A federal district court reached the opposite result in Church of Scientology International v. Eli Lilly & Co. (S.D.N.Y. 1991), 778 F.Supp. 661, in which the Church of Scientology filed a defamation suit against Eli Lilly, a brokerage firm, and a securities analyst employed by the brokerage firm. In response to a newspaper article about some of the alleged side effects of the drug Prozac, which is manufactured by Eli Lilly, the securities analyst wrote an "advisory" recommending that investors continue to buy Eli Lilly stock. He wrote:

> The final addition to Prozac's package insert in May concerned one case of "violent behavior." In this case, a depressed man taking Prozac committed mass murder. Interestingly, this man, Mr. Wes Becker [sic], happened to be a member of the Church of Scientology. The Church and other related special interest groups have, in our opinion

> been on a vendetta to discredit Prozac. (Emphasis in original.)

Id. at 664.

The federal district court concluded that these statements were factual assertions that were actionable under Milkovich, supra. The Court went on to state:

> Furthermore, the context is substantially equivalent to an internal memo, and its tone is business-like and solemn. *** Although subjective in tone, the commentary purports to be based on actual facts, and to be pointing out their implications, not to be making a personal prediction or hyperbolic characterization. The impression created by these words in the mind of a reasonable person could be that they were purporting to state the truth of the matter, not merely the author's opinion.

Church of Scientology, supra, at 668. See, also, Unelkco Corp. v. Rooney (C.A.9 1990), 912 F. 2d 1049, certiorari denied (1991), ____ U.S. ___, 111 S.Ct. 1586.

We find that the rat letters are more like the articles in Phantom Touring than the investment advisory described in Church of Scientology in that their general tenor negates any impression that the statements contained in them are factual assertions. The letters are so couched in exaggeration and hyperbole and are so subjective in tone that a reasonable person could only conclude that the author was voicing an opinion rather than stating actual facts. Therefore, pursuant to Hustler, supra, and Milkovich, supra, we hold that the letters fall within the realm of protected speech and cannot subject the author to liability for defamation or intentional infliction of emotional distress.

We cannot dispute the jury's conclusion that the letters are outrageous, nor can we dispute an expert witness' conclusion that they are the product of a sick, paranoid mind. Certainly the author could have found a better method and a better forum to express his views. However, public debate cannot be suppressed

merely because speech is outrageous. "'Outrageous' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." Hustler, supra, at 55, 108 S.Ct. at 882.

In a defamation case, the question whether evidence in the record is sufficient to support a finding of actual malice is a question of law. An appellate court has an obligation to examine the record and make sure the "judgment does not constitute a forbidden intrusion on the field of free expression." Milkovich, supra, at _____, 110 S.Ct. at 2705, quoting Bose Corp. v. Consumers Union of United States, Inc. (1984), 466 U.S. 485, 499, 104 S.Ct. 1949, 1958. According, we conclude that the trial court properly granted a directed verdict in favor of Wells and the other defendants as to the defamation claims and Bross' and Schmidt's

emotional distress claims. The trial court erred in overruling the motion for a directed verdict as to Marsh's emotional distress claim. Accordingly, appellees' first and third assignments of error are overruled and Wells' third and fourth assignments of error are sustained.

Because we consider the constitutional issues to be dispositive of the appeal, we need not address the other issues raised by the parties and, in the interest of judicial economy, we decline to do so. All other assignments of error set forth in the appeal and the cross-appeal are overruled.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed in part and reversed in part, and this cause is dismissed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas

for execution upon this judgment and that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

Costs to be taxed against plaintiffs-appellees/bross-appellants.

To all of which plaintiffs-appellees/bross-appellants, by their counsel, except.

JONES, P.J., KOEHLER and YOUNG, JJ., concur.

APPENDIX A

Wells presents seven assignments of error for review, as follows:

Assignment of Error No. 1:

> THE COURT DID NOT ERR IN DISMISSING THE DEFAMATION CLAIMS OF ALL PLAINTIFFS-APPELLANTS, AND THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS OF PLAINTIFF-APPELLANTS [sic] BROSS AND SCHMIDT.

Assignment of Error No. 2:

> THE COURT ERRED IN ADMITTING DOCUMENTS ALLEGED TO HAVE BEEN WRITTEN BY THE DEFENDANT-APPELLEE WELLS AS THEY WERE NOT PROPERLY AUTHENTICATED.

Assignment of Error No. 3:

> THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT-APPELLEE WELLS' MOTION FOR A DIRECTED VERDICT AS TO THE INTENTIONAL INFLICTION OF EMOTIONAL

DISTRESS CLAIM OF THE PLAINTIFF-APPELLANT MARSH.

Assignment of Error No. 4:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLEE WELLS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM OF PLAINTIFF-APPELLANT MARSH.

Assignment of Error No. 5:

THE TRIAL COURT DID NOT ERR IN ORDERING A NEW TRIAL WHEN IT FOUND THAT THE VERDICT WAS THE RESULT OF PASSION OR PREJUDICE.

Assignment of Error No. 6:

THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT-APPELLEE WELLS WAS ONLY ENTITLED TO A NEW TRIAL ON DAMAGES AFTER IT HAD DETERMINED THAT THE VERDICT WAS THE RESULT OF PASSION OR PREJUDICE.

Assignment of Error No. 7:

THE VERDICT OF THE JURY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Bross, Schmidt and Marsh, in their cross-appeal, present three assignments of error for review, as follows:

Assignment of Error No. 1:

THE COURT ERRED IN DISMISSING PLAINTIFFS' BROSS AND SCHMIDT'S CLAIMS AGAINST DEFENDANTS EARL SMITH AND THE CITY OF MIDDLETOWN, AND DEFAMATION CLAIM AGAINST DEFENDANT WELLS.

Assignment of Error No. 2:

THE COURT ERRED IN GRANTING A NEW TRIAL ON THE SUBJECT OF DAMAGES IN THE CLAIM OF MARSH VS. WELLS.

Assignment of Error No. 3:

THE COURT ERRED IN DISMISSING THE DEFAMATION CLAIMS OF ALL THE PLAINTIFFS.

THE SUPREME COURT OF OHIO

1992 TERM

To wit: October 21, 1992

Dennis Bross et al., :

Appellants/Cross-Appellees Case No. 92-1417

:

v. : E N T R Y

:

Earl Smith et al., :

Appellees/Cross-Appellants.

Upon consideration of the motion and cross-motion for an order directing the Court of Appeals for Butler County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motions are overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Holbrock & Jonson.

COSTS:

Motion Fee, $0.00, paid by Robert J. Gehring. (Court of Appeals Nos. CA9011217 & CA9104067)

THOMAS J. MOYER

Chief Justice

THE SUPREME COURT OF OHIO

1992 TERM

To wit: December 2, 1992

Dennis Bross, et al. Appellants/Cross-Appellees	:	Case No. 92-1417
v.	:	REHEARING ENTRY
Earl Smith et al. Appellees/Cross-Appellants	:	(Butler County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals Nos. CA9011217 & CA9104067)

_____

THOMAS J. MOYER

Chief Justice

OFFICIAL M.P.D. RAT LIST

Donnie Owens	Ted Marsh
Mike Bruck	Bill Becker
Jim Moore	Denny Bross
Steve Schmidt	Delbert Barker, Jr.
Michelle Brown	Robin Collier
Becky Swanson	Frank Hensley
Cindy Thompson	

They fucked the Chief, give them half a chance and they'll fuck you too. Think about it. Think about what it is doing to the F.O.P. Any motherfucker that rats on a cop is no cop.

EXHIBIT 1

(Typed)

OFFICIAL RAT LIST

Donnie Owens, a backstabbing cocksucker who forgot what he was like as a patrolman the minute he made rank.

Mike Bruck, who is so fucking stupid he couldn't hold any other job besides suckass sergeant.

Bill Becker, who needs bucks and status, and depended on Burns word to try and get them.

Delbert Barker, Jr., who stays fucked up on pills so much of the time that he has to call off work.

Robin Collier. Cunt. Period.

Steve Scmidt. A load. Wouldn't make a pimple on a cop's ass.

Jimmy Moore. A fucking lush. Russ tried to help him, then he crossed over to Burns' side, God knows why.

Cindy Thompson. Cunt. Pillhead.

Denny Bross. Load. Pillhead.

Becky Swanson. Dumbass cunt.

Lori Hubbard. Big tittied cunt, who can't even answer a telephone. Now sucks Delbert's dick and says anything he tells her to say like a goddamn parrot.

A real hall of fame. These would make a real credible witnesses in court. Russ should have gone to the wall. Coupled with the testimony of that toothead Lopez, the trial would have been real entertaining.

Russ obviously finally couldn't stand the heat, but did not deserve the fucking he took. Malott is a pompous asshole, not unlike Burns in his own way, but he at least did his job. If he is going to fall and take Davis and Knable with him, the above listed stoolpigeons need to go to. Enough information exists to at least ruin them with the department, because none of them have any fucking character.

All you goddamned commissioners knew about all this shit, and you let Burns fuck Russ anyhow. Hope the media picks upon on that. A published picture of Burns and Cindy Strayer might be worth some money to Penthouse, but sure won't do much for the public image of this city. Time to stop messing around and play hard ball. Burns never really played against somebody who was willing to push back. Now he gets a taste. He has one chance. If he makes some flimsy excuse and resigns, no more happens. If he dicks around and tries to bluff, he gets fucked, as does

everybody else mentioned above. They all have a file. There is an old saying about all the eggs in one basket. Burns forgot about that.

EXHIBIT 2

(Typed)

Today is July 7. You have one week.

Period.

BILLY BOB BURNS:

The moment of truth has arrived. You had your brief period of triumph after your successful reaming of Russ, and the whole town had to see you gloat out at the High School over the holiday. But there may really be a just Deity after all, because when you and your fucking stooges cleaned out Malott's office, you didn't look everywhere. And you forgot that Malott didn't survive all those years in Narcotics because he was stupid. He has copies of everything - including the pictures of you and that airhead bitch Cindy that you so smugly sneaked out of the building. Let us talk plain English from here on in . . . . . You will resign from your farcical position as Ruler of the World. You can call it personal reasons, or the strain of the events of the past couple of

weeks, or whatever you wish, but you will get the fuck out of this city before you screw up anyone else's life. And you had better tell all your fucking dopeheaded backbiting hypocritical RATS that you can't cover their asses anymore, and that they had better consider getting the fuck out, too. For example, the records of Jimmy's stay at the detox center have been obtained, and can be leaked. You want to play bluff? Fine. Copies of this letter are being sent to Jim Mills, Bill Donham, Guy Stone, Gary Kaup, and Sher Patrick of 22 News. Let those cockbites Shupe and Schafer read about it in the papers. You resign, all this will be innuendo and speculation, just like you did to Russ. You don't, and your career falls, your family falls, and your existence falls. Unlike you, some people have a smatch of honor and keep their word. You resign, and nothing else will be said.

You don't, the dominoes start to fall. You, Strayer, Owens, etc., etc., It is up to you.

EXHIBIT 3

(Typed)

THE LAST TIME I CHECKED, MIDDLETOWN, OHIO WAS STILL IN THE U.S.A.

RECENTLY, I FEEL AS IF I AM HAVING A BAD DREAM, AND BY UNKNOWN WAYS, MIDDLETOWN HAS SOMEHOW BEEN TRANSPORTED TO A COUNTRY THAT DOES NOT KNOW THE MEANING OF JUSTICE.

OUR HERO IN THIS SCENARIO IS KNOWN AND ASSOCIATED WITH U.S.A., ALL-AMERICAN, THE CONSTITUTION AND APPLE PIE.

ENTER THE VILLIAN, BILLY BOB KADAFFY, WHO CHARGES OUR HERO WITH 47 CHARGES, PROMISES MORE, AND SAYS "HAVE FAITH IN ME."

OUR HERO, WHO HAS LONG BEEN A HARD HITTER, A GO-GETTER, CRIME FIGHTER AND BULL-SHITTER; IS SURPRISED BY NOT ONE BUT FIVE JUDAS PROSTITUTES IN HIS STAFF, FOUR WITH STRIPES, ONE WITH A BAR.

THE GOVERNMENT REPRESENTING WHO WERE ELECTED BY A DEMOCRATIC PROCESS ARE LOOKED ON BY OUR HERO AND THE PUBLIC FOR RELIEF.

"LET ME PLEA MY CASE," SAYS OUR HERO. HE IS ANSWERED WITH, "I SEE NO PURPOSE," "NO COMMENT," "CONTACT MY ATTORNEY," "I WILL NOT

ATTEND," AND TO SHOW THAT NOTHING IS ALL BAD OR GOOD, ONE SAYS "OKAY." THE LEADER OF THE GOVERNMENT BODY SAYS FORGET THE 47 CHARGES AND A PROMISE OF MUCH MORE TO COME. YOU ARE MISTAKEN IN ASSUMING THE ISSUE WAS CRIME. IT WAS NOT! WE TOOK SUPERMAN'S CAPE AND HE'S NOT GETTING IT BACK, DON'T BOTHER US WITH ALL

IS THIS A COMEDY, DRAMA, OR A SCIENCE-FICTION DREAM? LET'S TRY MYSTERY, AND IT'S TIME FOR THE TRUTH TO START EMERGING!

TUNE IN NEXT WEEK FOR THE NEXT CHAPTER.

WHICH ONE OF THE JUDAS WHORE'S WILL WEAR SUPERMAN'S CAPE?

WILL THE U.S.A. BOMB BILLY BOB'S OFFICE?

WILL THE CALAVERY COME TO THE RESCUE?

REMEMBER, DON'T PISS ON SUPERMAN'S CAPE AND LONG LIVE COL. NORTH AND COL. DWYER!

(SIGNED) THE PHANTHOM

EXHIBIT 4 AND 5

(Handwritten)

All you motherfucking rats should be fired. Russ Dwyer covered your asses for shit you should have been fired for long ago, and you treacherous cocksuckers repay that by becoming fucking rats. Owens got a job created for him, Marsh and Bruck stole their way into making sergeant, Moore is a fucking lush and Dwyer covered it up, Fat Frank is a god dam thief (not to mention a prick), Cindy Thompson and Michelle Brown are cunts, Hoffman is a doper, Delbert is a doper, Bross is a pillhead, Becker is just a general suckass, Becky will fuck anything that looks twice at her, all this is common knowledge. But Schmidt? Dwyer covered Schmidt's ass forever. His defection to Burns is almost as unbelieveable as Paul Lewis. You motherfuckers should all take a good look in the mirror and remember where you came from and who got you there. You don't have anybody to cover your sorry asses anymore, now that fuckhead Burns went to Kansas. Choke on it, you cocksuckers. See you all in your future Civil Service

hearings. Three words of advice - Find A Job. None of you are worth a fuck.

EXHIBIT 6

(Typed)

Hello again, you motherfucking RATS,

By now, you have all done enough bellyaching and crying about how much stress you are under because people around here who have some guts and hate yours had the nerve to take exception to the shit you all did with your sugar daddy Burns. Why don't you all go to Minesota with him? Maybe by now all you cock suckers have read that article about the drug freak in Pennsylvania who got fired after his wife ratted him out. The judge said that a policeman who uses drugs isn't fit to be a policeman. Sure do hope Ohio law sees it the same way, because sooner or later this issue is going to come up publicly about all you dopehead motherfucking RATS. No matter how much shit you cocksuckers did that gets swept under the goddam rug because Emmet didn't have the guts to fire your asses when he had the chance, the public is going to be the ones to have the last say when all this shit goes public at a Commision meeting. Once

the lawsuits start up, all this shit will be out in the open. Burns wanted an excuse to get rid of the Cheif and used the fact that he was fucking some of the women around here, but he forgot about his fairhaired boys. You motherfuckers have got away with fucking each other's wives and girlfriends, your partners, your own goddam daughter, you come in to work drunk and don't hit a fucking lick, you steal shit from the city, you're all part of a goddam felony conspiracy, even sell drugs. And some of you motherfuckers want promotions? Goddam, what guts you must have. Smitty better watch his fucking back. You cocksuckers have probably got a plan to fuck over him by now. Only Burns isn't here to mastermind it, and you motherfuckers don't have the smarts to get away with it yourselves. Just remember, some of you motherfucking RATS worked over there with Malott, so when he starts testifieing, your names will come up too, and you won't have that chickenshit Burns to cover your asses anymore.

There are people here who have given half their goddam lives to this job, and you motherfuckers come along and tear all that up. Fuck you all. Magill has defended you cocksuckers right along, even tried to keep you from having to take a drug test. People have to walk through metal detectors before they get on a plane all the time. If you don't want to give a piss sample, don't get on the goddam plan. Just remember, motherfuckers, the prosecuting attorney's office is going to be in this place like a bunch of goddam ants after this shit goes public. They'll be taking depositions from anybody that wants to talk, and it'll all be under oath. And then everybody will see you motherfucking RATS for what you are. If there is any justice, maybe at least three of you cocksuckers will get some jail time besides losing your job. Maybe Burns will come back and plead your case. It'll be the only chance you miserable motherfuckers will get. Holcomb is fed up with this shit, and he is going to get your fucking asses. And did you

ever stop to think what our own judge thinks about all this shit? No wonder we have such a bad record up there. The judge has to be wondering about the cops who appear before his court, and we are going to lose the close ones. Every time we make a mistake up there, he is going to wonder why. Now go run and cry about people who don't like you and the underhanded shit you did. With all the retirements and other openings, where in the hell are we going to find decent young kids to hire? Who in the hell would want to come in to a situation like this? We'll probably end up with a bunch of goddam dopeheads like you, and in a few years we will have to get rid of them, too. This used to be a good place to work, but you motherfuckers have succeeded in tearing it up. Fuck all you motherfuckers.

EXHIBIT 7

(Typed)

TO: Sgt. Marsh, Maj. Wells, Chief Smith

FROM: Off. S. Daley

SUBJECT: Enclosed letter

DATE: 8-17-88

Sirs,

Normally, I would feel what garbage such as that enclosed would not warrant a response. However, several other related incidents have been brought to my attention.

I arrived for the 11PM to 7AM shift on Tuesday, 8-16-88 when I was presented with a copy of the enclosed letter. I read it and found that whoever was responsible for it was no doubt deranged. I also found that this letter was also creating turmoil where turmoil already exists. I also found that this letter was circulating

throughout the department. What mainly concerns me is that if this letter was written by present officers or a single officer, this individual has a very serious problem. The problem this person has is a clear threat to everyone named in the letter and I along with others may be working with this individual at one time or another. This creates a very serious problem.

It also came to my attention that prior to this letter being circulated, a certain police officer was at the police desk and was "running his mouth" stating almost verbatim what came out in the letter. If this is true, that officer is a guilty as the one or ones who wrote the letter. The reason I am bringing this to your attention is because I believe an investigation is needed. If you would like to talk with me in order to give you the officer's name and who informed me, I would be happy to do so.

I also feel it is time to either make a strong statement from the administration as to denounce this sort of activity and to insure every member of the department that if the culprit is caught, every effort will be used to discipline that officer. It is well overdue for this department to get back together and work toward our primary objectives. I feel this can only be accomplished by sincere positive leadership, and leave the negative rewards for persons who engage in activity such as this letter.

Maybe a departmental meeting should be considered. I sincerely feel that some action must be taken at this point because ignoring this sort of activity is apparently not accomplishing any worthwhile purpose.

Please feel free to contact me at your earliest convenience.

Respectfully,

Stephen M. Daley

cc: Jerry Bryant, atty.

EXHIBIT 8

(Typed)

This is great. You motherfucking RATS have saved the city and the F.OP. and the courts a lot of trouble. It took a long time, longer than it should have, but your time has finally come. After all of you dopers, you trecherous two faced cocksucking spineless assholes, you mutinous theiving cowards are fired, like you should have been in the first place, maybe Smitty can get the department back to some respectible level again.

Downey's statement did more to hurt you motherfucking RATS that it did Russ Dwyer. Bross is going to be fired because he's a fucking doper. Bruck and Marsh are going to be fired because they are guilty of the same shit they accused Dwyer of doing. Daley is going to be fired because the Prosecutor is reopening his case. Becker is going to be indicted for conspiracy before he is fired. Jimmy Moore probably won't be fired but he should be, after

he forced Riggs and Hall to swear to his bullshit story about his drunk driving accident.

Mallott will probably have to go, too, but that gives the city an excuse to get rid of Schmidt, because Mallott will tell all the shit he and Schmidt did when they were working together (Remember, cocksucker?). Van might make it to retirement, but he will have to be mentioned in the conspiracy no matter what. Owens is no better than a fucking street burglar. At the very least, he is guilty of negligence in the theft of the guns out of Russ Dwyer's office, and his ideas of being the chief went out the window as soon as Burns didn't push Van through.

You motherfucking RATS couldn't be as stupid as you all act. Anybody who has every played politics knowns that Burns was going to roll over on all of you cocksuckers and blame the whole thing on you as soon as he started getting some static from the public. Some of you

motherfucking RATS have had the balls to complain about younger officers taking over some of the pet jobs. What a fucking shame. At lease the younger officers haven't tried to overthrow the god dam department for their own use. Maybe if we're lucky you dope head cocksuckers will die of overdoses. It would be even funnier if you had to do jail time. You god dam sure deserve some. You aren't no fucking policemen.

The only bad thing is how people who didn't have nothing to do with any of this shit are getting hurt, and will continue to do so. Tony Carter's wife is going to be embarassed, Jim Griffith's wife is going to be embarassed, Marsh's wife, Becker's wife, Bruck's wife, every one of your god dam kids. You cocksuckers never even thought of that shit.

If the F.O.P. had any balls at all it would not only kick you out of office, it would throw you

out of the god dam lodge all together. It's supposed to be policemen only, after all.

Smitty is having to explain all this shit to the Prosecutor, the Attorney General office, and all kinds of press media, because copies of the depositions and copies of this letter are circulating everywhere. Serves you right.

Fuck you motherfuckers.

EXHIBIT 9

(Typed)

for the most part, cops hate all members of the press. but now, since all of you know about the shit that has gone on here and is still going on here, and refuse to do anything about it, the press is going to be notified every time something new comes up. klosterman is probably a real nice man, but he doesn't know shit about running the city, so it wont' do any good to talk to him. the law department and the comission were the ones who should have gotten rid of the motherfucking rats long ago, even before it became known facts that they were doing felonys for fuckhead burns. and now that you all know about it, and still dont' want to do anything about it, that makes you must as guilty as they are for helping to cover it up. In a coup;e of years, not only will you be allowing the motherfucking rats to keep their jobs, we could see one of them being the next goddam cheif of police. that would be real great for a young kid getting hired, he could get introduced to the cheif, who could explain all

the city ordnances to him, and tell him not to get caught breaking in to anyone else's house, or their office, but if you do it is ok, because after they catch you the city comission and the law department will cover it up for you. welcome to the police force. everybody likes to talk about what a prick bowerton was, but bowerton would have thrown all the motherfucking rats out on their ear the first day. and he wouldnt' have spent any of the city's money on some dumb asses from out of town to come in and interview a bunch of people, either. what a rip off that was. it looks like to be a cop in middletown now, you have to work with theifs and burglars and dopers and liars and it's all right because the politiciens could care less. maybe we could get klosterman to do something about it if they were breaking in to his lake. every day that these motherfuckers still work for the city, you crooked politiciens are letting the city down, and are stealing from the citizens because you are giving the money for these motherfuckers'

saleries, and they should have been fired. and you are letting them, no you are ordering them, to supervise real cops and tell them what they are doing wrong. never mind that the supervisers are the ones who did the felonys. they should be in jail getting their ass holes reemed out instead of telling cops how to act. the old time dwyer supporters would like to do something, but they dont' want to lose their pensions this later in the day. so the only hope is the politiciens. remember that getting rid of the cheif was a team effort, not just that fuckhead burns. all the motherfucking rats should get the option of resign or be prosecuted. it is a shame the fop stuck up for that dopehead bross, but the fop knows better than to stick up for a bunch of cock suckers who do felonys. police should be immune from working with the same people they are supposed to be sending away up the river.

EXHIBIT 10

(Typed)

IT IS TIME TO STOP HIDING, THE TRUTH FROM THE HONEST CITIZENS OF THIS COMMUNITY. YOU POLITICIENS KEEP BLOWING SMOKE AND AVOIDING THE FACTS, AND BELEIVE NO ONE WILL EVER FIND OUT. JUST REMEMBER, THE PEOPLE SPOKE WHEN THEY GOT RID OF PAT SHAFER AND GARY SHUPE. THEY CAN SPEAK AND GET RID OF YOUR ASSES TOO. IT IS A GOD DAM SORRY SHAME WHEN YOU LET THESE MOTHERFUCKING RATS FUCK OVER DWYER AND HIS FAMILY AND THEN WALK AWAY. YOU PAY THE CITY'S MONEY TO THAT COMPANY TO RESEARCH ALL THE PROBLEMS WE HAVE AND THEN PRETEND THE PROBLEMS DONT' EXIST. EVERY DAY YOU PAY THE SALARIES OF THE MOTHERFUCKING RATS YOU ARE STEALING.

ALL THIS TIME YOU KNEW WHAT THEY HAD DONE AND YOU PRETENDED IT NEVER HAPPEND. WHAT YOU REALLY DID WAS TELL THOSE COCKSUCKERS THAT WHAT THEY DID WAS ALL RIGHT. IF THEY DIDNT' DO IT, THEY SHOULD BE CLEARED OF IT PUBLICALLY, AND IF THEY DID DO IT, THEY SHOULD HAVE THEIR ASSES PROSECUTED PUBLICALLY. ALL OF THEM SHOULD BE FIRED AS POLICEMEN. SHUMAKE, MARSH, OWENS,

SCHMIDT, AND HOFFMAN SHOLD BE IN JAIL, BROSS SHOULD BE IN JAIL. DAILEY SHOULD BE IN JAIL. BRUCK SHOULD BE DEMOTED BECAUSE HE STOLE HIS FIRST SARGENTS' PROMOTION. HIRING THESE NEW KIDS CAN NEVER REPLACE THE GOOD POLICEMEN WHO HAVE SAID FUCK IT AND LEFT BECAUSE THEY WERE TIRED OF PUTTING UP WITH THIS SHIT. MORE ARE THINKING ABOUT IT ALL THE TIME. THE PROSECUTOR COULD CARE LESS. THE SHERIFF COULD CARE LESS. SMITTY WANTS TO GET HIS TIME IN AND GET OUT SO HE DOESN'T GIVE A SHIT ANY MORE. WELLS ISN'T SMART ENOUGH TO MAKE ANY DIFFERENCE. ERNIE HAS HAD ENOUGH. EMMIT FUCKED UP THE DOPER INVESTIGATION SO HE WILL NEVER GET A CHANCE TO DO ANYTHING MORE. FROM TOP TO BOTTOM IN THE SUPERVISERS RANKS WAYNE HALL IS THE ONLY ONE WITH ANY LEADERSHIP ABILITIES AT ALL WHO IS SMART ENOUGH TO USE IT. OUR FOP IS A LAUGHING STOCK ALL OVER THE STATE BECAUSE OF THE WAY BECKER FUCKED OVER THE MEMBERS DURING THE DWYER THING, AND THE MEMBERS REVOTED HIM BACK IN. NO WONDER THINGS ARE SO FUCKED UP, WE LET THE RATS DO THIS TO US AND WE

DONT' CARE. BEING A COP WAS A GOOD JOB BEFORE PEOPLE STARTED FUCKING AROUND WITH IT. YOU CANT' JUST DO THE COP JOB ANY MORE BECAUSE TOO MANY PEOPLE ARE POKING THEIR NOSE UP YOUR ASS HOLE TO SEE IF YOU MIGHT HAVE MADE SOME MISTAKES ALONG THE WAY AND MIGHT BE ABLE TO CATCH YOU AT IT. THE SUPERVISERS FORGET WHAT THEY DID WHEN THEY WERE JUST PLAIN COPS. IF YOU POLITICIENS REALLY CARED ABOUT THIS CITY AND PEOPLE IN IT AND NOT JUST THAT SILLY FUCKING LAKE PROJECT YOU WOULD DEMAND A REAL LIVE INVESTIGATION OF THIS SHIT. AND PUT THE BURGLARS WHERE THEY BELONG. BY LETTING THIS SHIT GO ON ALL THIS TIME YOU MIGHT NOT BE GIVING IT YOUR APPROVAL, BUT YOU SURE ARE LOOKING THE OTHER WAY. AND THAT IS JUST AS BAD BECAUSE IT SHOWS THAT YOU DONT' REALLY GIVE A FUCK ABOUT RIGHT VERSIS WRONG AFTER ALL.

EXHIBIT 11

No. 92-1520

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DENNIS RICHARD BROSS
THEODORE MARSH
STEVEN SCHMIDT

Petitioners,

vs.

EARL SMITH
DONALD WELLS
CITY OF MIDDLETOWN, OHIO

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF THE RESPONDENTS EARL SMITH AND DONALD WELLS IN OPPOSITION

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QUESTIONS PRESENTED

The Petitioners, all public officials, claimed defamation and intentional infliction of emotional distress based upon documents which did not contain false statements of fact made with actual malice. The questions presented are:

1. Whether the Petitioners can recover for the intentional infliction of emotional distress based upon the publication of those documents without showing that the documents contained false statements of fact made with actual malice.

2. Whether the evidence was constitutionally sufficient to support a judgment against the Respondent Wells where there was no evidence to support a finding that the documents upon which a judgment was based were authored by the Respondent Wells, that they were written with actual malice or that they related to Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

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DENNIS RICHARD BROSS
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Petitioners,

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EARL SMITH
DONALD WELLS
CITY OF MIDDLETOWN, OHIO

Respondents.

BRIEF OF THE RESPONDENTS EARL SMITH AND DONALD WELLS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

The Respondents Earl Smith and Donald Wells request that this Court deny the Petition for Writ of Certiorari.

PROCEDURAL STATEMENT OF THE CASE OF THE RESPONDENTS SMITH AND WELLS

The Petitioners, three police officers of the Middletown, Ohio Police Department, initiated this action in the Butler County, Ohio Common Pleas Court in 1989. All Petitioners

claimed defamation and intentional infliction of emotional distress. The defamation claims were based upon nine documents which the Petitioners claimed were authored by the Respondent Wells, an assistant chief in the police department. The Petitioners claimed that the Respondents Smith (the Middletown chief of police) and the City of Middletown were liable respectively as the supervisor and employer of Wells.

The action was tried to a jury in July of 1990. At the close of the Petitioners' case the court directed a verdict dismissing all defamation claims of all of the Petitioners and the intentional infliction of emotional distress claims of Petitioners Bross and Schmidt. The court also directed a verdict as to Petitioner Marsh's intentional infliction of emotional distress claim against the Respondents Smith and the City of Middletown.

The only issue submitted to the jury was Petitioner Marsh's intentional infliction of emotional distress claim against the Respondent Wells, even though the court had previously ruled that the documents which formed the basis of Petitioners' claims were not defamatory. The jury returned a verdict in favor of Marsh against Wells in the amount of $100,000.00 compensatory damages and $500,000.00 punitive damages.

Post-trial motions were filed by the Petitioners and the Respondent Wells. Wells in his post trial motions moved for a judgment notwithstanding the verdict as well as for a new trial. The trial court granted Wells' motion for a new trial finding that the verdict was the result of passion or prejudice and granted a remittitur. Thereafter, the trial court modified its post trial judgment, still finding that the verdict was the result of passion or prejudice, and granted a new trial only as to damage issues.

The Petitioners and the Respondent Wells filed appeals in Ohio's Twelfth District Court of Appeals. That opinion is found at 80 Ohio App. 3d 246 (1992). Wells presented seven

assignments of error. The court of appeals only ruled on two of the assignments of error.

On an assignment of error regarding the admissability of the allegedly defamatory documents as evidence, the court of appeals ruled that the documents were properly authenticated and admitted into evidence. On another assignment of error presented by Wells, the court of appeals found that the documents were *not* defamatory and for that reason, under the holding of *Hustler Magazine* v. *Falwell*, 485 U.S. 46 (1988), no claim for intentional infliction of emotional distress was stated. The court of appeals thus affirmed the trial court's dismissal of all defamation claims, affirmed the directed verdict granted by the trial court on Bross' and Schmidt's intentional infliction of emotional distress claims, and reversed the trial court's judgment on the intentional infliction of emotional distress claim of Marsh against Wells.

Since the court of appeals found its decision on the constitutional issue to be dispositive of the entire case, it summarily overruled all other assignments of error including Wells' assignments of error relating to weight of the evidence, damages, the standard for proof in a claim of intentional infliction of emotional distress, and his motion for a new trial.

The Petitioners filed a notice of appeal to the Ohio Supreme Court arguing that the Ohio Court of Appeals erroneously decided the case. Wells filed a notice of appeal to the Ohio Supreme Court in order to preserve his right to argue error on the part of the court of appeals.

The Ohio Supreme Court refused to entertain jurisdiction of the case and dismissed the appeal finding that no substantial constitutional question existed. 65 Ohio St. 3d 1431 (1992).

FACTUAL STATEMENT OF THE CASE OF RESPONDENTS SMITH AND WELLS

Subject to the following corrections and additions, Respondents Smith and Wells adopt the factual statement of the case as set forth by the Butler County, Ohio Court of Appeals found in the appendix to the Petition for Writ of Certiorari.

The following corrections and additions should be noted. No witness testified that the Respondent Wells actually authored or published any of the documents which were the basis of Petitioners' claims. There was a complete lack of evidence showing that the Respondent Wells played any part in publishing any of the letters that were submitted into the evidence. Two of the letters were handwritten and there was no testimony identifying the Respondent Wells as the author of those letters.

Despite Petitioners' contentions, there was no finding that the documents contained any threats against the Petitioners. Indeed, the evidence at trial and as found by the court of appeals was that the documents could not be found to contain statements of fact or threats to the Petitioners.

REASONS WHY THE PETITION SHOULD BE DENIED

1. No reasons exist for the grant of certiorari as the trial court and the court of appeals applied well settled principles of law in finding that there was no defamation and consequently no claim for the intentional infliction of emotional distress.

In *Hustler Magazine* v. *Falwell*, *supra*, the Court held that no cause of action exists for comments relating to public officials where there is no reasonable basis to believe that the statements were false. The Court specifically stated:

> . . . [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contained a false statement of fact which was made with "actual malice", i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. 485 U.S. at 56.

The Petitioners claim that the outrageous nature of the letters provides them with a cause of action. However, the court in *Hustler* rejected such an argument:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse impact on the audience. 485 U.S. at 55.

In *Hustler*, a nationally known minister and commentator on politics and public affairs filed suit against *Hustler* magazine claiming emotional distress arising from a "parody"

which among other things portrayed him as having engaged in a drunken, sexual rendezvous with his mother in an outhouse.

The *Hustler* Court held that a state's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech even though it is patently offensive and intended to inflict emotional injury, when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. 485 U.S. at 50.

The court of appeals correctly determined that the Petitioners were public officials. *Mueller* v. *Stover Communications Inc.*, 46 Ohio App. 3d 57, 545 N.E.2d 1317 (1988). It appropriately applied the standards for defamation cases set forth in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). Applying *Hustler* and *New York Times*, the appellate court correctly found that there was no defamation and thus no claim for the intentional infliction of emotional distress based upon the publication of the documents at issue here.

Here, there was no evidence that anyone viewed the letters as being defamatory. No witnesses testified that they thought the Petitioners' reputations were affected. Similarly, there was a lack of evidence to support the Petitioners' claims that the letters contained actual threats. *See Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U.S. 6, (1970) ("[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet . . ." *Id.* at 14).

Certiorari should not be granted in this case as the Petitioners are essentially asking this Court to review evidence and facts presented to the trial court and the court of appeals. This Court has consistently held that it will not undertake to review findings of fact by two courts below in the absence of a very obvious and exceptional show of error. *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) and cases cited; *See also Rodgers* v. *Lodge*, 458 U.S. 613, 623 (1982).

There is no constitutional imperative for this Court to review this case. The standards put forth by this Court in public official defamation cases from *New York Times* to *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990) were followed by the court of appeals. The appellate court conducted an extensive and independent review as required by *Bose Corporation* v. *Consumers Union*, 466 U.S. 485 (1984). Under the *New York Times* v. *Sullivan* standard, the Petitioners had the burden of showing by clear and convincing evidence that these documents were defamatory. The trial judge found that the documents were not defamatory as did the court of appeals. Deference should be granted to those two identical findings of fact.

Because the court of appeals found that the documents were not defamatory and thus could not support a jury finding of intentional infliction of emotional distress, it summarily overruled all other contentions made by the Respondent Wells as to whether or not the evidence was sufficient to support a finding that he did indeed author and publish the documents in question. However, it never directly addressed the issue of whether sufficient evidence was presented for a jury to conclude that Wells wrote the letters. Should this Court grant certiorari, the Respondent Wells will argue that the evidence was constitutionally insufficient to support a finding that Wells authored and published the documents. The evidence at trial was also insufficient to support a finding that the documents were written with malice or that they even referred to the Petitioners. At best, the documents were no more than severe and crude criticisms of government made by an anonymous author. The First Amendment prohibits the imposition of liability on such a basis. *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966).

2. This case does not present issues that warrant review by the Supreme Court.

This case does not present an opportunity for the Court to further review its prior decisions in the area of defamation and intentional infliction of emotional distress. Those issues have been recently visited and decided by this Court in *Hustler* v. *Falwell*, *supra*.

This case does not involve an issue of great public importance. This case was an internal squabble among personalities within the Middletown, Ohio Police Department. This is not a case that presents an issue of defamation in the context of the mass media. There is no conflict with other decisions. This case contains unique facts that are not likely to be encountered by other litigants and thus will not have a great impact on other cases.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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